REDACTED – FOR PUBLIC INSPECTION

March 31, 2011

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Federal Communications Commission
Office of the Secretary

ORIGINAL

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

*Re: Joint Motion for Partial Stay of Wireline Competition Bureau's February 8 Letter in In the Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, WC Docket No. 05-337, CC Docket No 96-45*

Dear Ms. Dortch:

AST Telecom, LLC d/b/a BlueSky Communications, Cellular South Licenses, LLC, Union Telephone Company, Corr Wireless Communications, LLC, East Kentucky Network, LLC d/b/a Appalachian Wireless, Illinois Valley Cellular RSA 2–I, Illinois Valley Cellular RSA 2 – II, Cellular Properties d/b/a Cellular One of East Central Illinois, Commnet Wireless, LLC, and PR Wireless, Inc. d/b/a Open Mobile ("Petitioners"), hereby submit an original and four copies of the Petitioners' Joint Motion For Partial Stay ("Stay Motion").

The Petitioners are also submitting REDACTED versions of the declarations of James H. Woody, Treasurer, Union Telephone Company and Federico Grosso, Chief Financial Officer and Vice President of Finance, PR Wireless, Inc., in support of the Stay Motion, to be filed in the above-referenced proceedings.

Petitioners are simultaneously submitting an original and four copies of the confidential versions of the declarations under a separate cover letter, which includes the information required by section 0.459(b) of the Commission's rules to support the request for confidential treatment of the commercially sensitive information contained in the declarations.

Respectfully submitted,

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By: /s/
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Enclosures

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| High-Cost Universal Service Support | ) | WC Docket No. 05-337 |
| | ) | |
| Federal-State Joint Board on Universal Service | ) | CC Docket No. 96-45 |
| | ) | |
| To: Wireline Competition Bureau | ) | |

# JOINT MOTION FOR PARTIAL STAY


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March 31, 2011

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## SUMMARY

The Petitioners' Joint Motion for Partial Stay should be granted expeditiously by the Wireline Competition Bureau because the directive to the Universal Service Administrative Company issued by the Bureau in its *February 8 Letter*[1] lacks any legal basis, and because implementation of the "debt collection" provisions of the *Letter* would cause significant and irreparable harm to the Petitioners and consumers. The Petitioners convincingly demonstrate that each of the four factors followed by the Commission in deciding whether to grant a request for stay weighs in favor of the Petitioners' Motion.

Success on the Merits.—On March 10, 2011, the Petitioners filed a Petition for Reconsideration of the *February 8 Letter* establishing that the *Letter* unlawfully modifies the Interim Cap adopted by the Commission in the *Interim Cap Order*[2] without first initiating and completing a notice-and-comment rulemaking proceeding. Moreover, the requirement in the *Letter* that Petitioners must repay to USAC support disbursements we have previously received is an overly burdensome regulatory obligation that violates the Takings Clause of the Fifth Amendment to the U.S. Constitution. Thus, the Petition for Reconsideration demonstrates that Petitioners are likely to prevail on the merits

In addition, even assuming the Bureau had authority to interpret the Interim Cap rule in the *February 8 Letter* without engaging in a rulemaking proceeding, its "interpretation" that the rule contemplates the retroactive repayment of high-cost support disbursements is not supporta-

[1] Letter from Sharon Gillett, Chief, WCB, to Karen Majcher, Vice President, High-Cost and Low Income Div., USAC, WC Docket No. 05-337, DA 11-243 (Feb. 8, 2011) ("*February 8 Letter*" or "*Letter*").

[2] *High-Cost Universal Service Support*, WC Docket No. 05-337, CC Docket No. 96-45, Order, 23 FCC Rcd 8834 (2008) ("*Interim Cap Order*"), *aff'd*, *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095 (D.C. Cir. 2009).

ble because it violates principles enacted by Congress in Section 254 of the Communications Act of 1934.

*Irreparable Harm*.—If this partial stay is not granted, the Petitioners and the public will be irreparably harmed because the unexpected and substantial repayment obligation imposed by the *February 8 Letter* will adversely and permanently affect our reputation in the financial community and hinder our ability to obtain and maintain working capital on favorable terms. The harm to our ability to obtain capital and the reduction of cash flow due to increased debt and decreased USF support will, in turn, reduce our ability to continue to provide quality services to our customers at reasonable and affordable rates, force us to reduce planned expansion of coverage into unserved areas, and diminish our competitiveness with other carriers in our service areas.

*Affect on Other Parties*.—Granting the Petitioners' requested stay will help, not harm, other parties. Consumers in rural and high-cost areas would in fact be harmed by a denial of our request for a stay. Absent a stay, we will be forced into a combination of some or all of the following: curtailment of planned network deployment, reduction of customer service, and imposition of rate increases for the services we provide. Consumers generally will not be harmed by a stay because there is virtually no likelihood that a stay would deprive consumers of reduced universal service surcharges, since it is highly unlikely that the repayments will reduce the contribution factor (which may be, but is not required to be, passed on to consumers).[3]

Incumbent LECs will not be harmed by a stay because maintenance of the *status quo* would not impose any burden on these carriers and would not interfere in any way with their continued receipt of universal service support. Because the Petitioners are requesting a partial

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[3] While the impact on the Petitioners is great because it falls on us disproportionately, the impact of the planned reduction of the cap on the size of the fund is *de minimis*—less than 2 percent overall.

stay, which would only bar implementation in states where the cap is reduced, competitive ETCs that may receive a greater level of support pursuant to the operation of the *February 8 Letter* will not be harmed by grant of a stay.[4]

*The Public Interest*.—The positive effect of a stay on the continued delivery of services and expansion of coverage areas to consumers in rural and high-cost areas and on the competitiveness of markets in which competitive ETCs are providing service, coupled with the fact that a stay would not have any adverse impact on other interested parties, demonstrates that the public interest favors a grant of the requested partial stay.

[4] Again, the impact of these increases in the cap on the overall size of the fund is *de minimis*—less than 0.5 percent.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| Federal-State Joint Board on Universal Service | ) | CC Docket No. 96-45 |
| | ) | |
| | ) | |
| To: Wireline Competition Bureau | ) | |

## JOINT MOTION FOR PARTIAL STAY

AST Telecom, LLC d/b/a BlueSky Communications, Cellular South Licenses, LLC, Union Telephone Company, Corr Wireless Communications, LLC, East Kentucky Network, LLC d/b/a Appalachian Wireless, Illinois Valley Cellular RSA 2- I, Illinois Valley Cellular RSA 2 – II, Cellular Properties d/b/a Cellular One of East Central Illinois, Commnet Wireless, LLC, and PR Wireless, Inc. d/b/a Open Mobile (jointly, the "Petitioners"), pursuant to Sections 1.41 and 1.43 of the Commission's Rules,[1] hereby submit this Joint Motion for Partial Stay ("Motion"), requesting the Wireline Competition Bureau ("Bureau") to stay the effectiveness of the *February 8 Letter*,[2] only insofar as the *Letter* requires the collection of funds from the Petitioners or a downward adjustment of the cap in any state, pending the disposition of a Petition for Reconsideration of the *February 8 Letter*, which the Petitioners filed on March 10, 2011 ("Petition for Reconsideration") in the above-captioned proceeding. Because the issuance of demand notices to the Petitioners by the Universal Service Administrative Company ("USAC") pursuant to the

[1] 47 C.F.R. §§ 1.41, 1.43.

[2] Letter from Sharon Gillett, Chief, WCB, to Karen Majcher, Vice President, High-Cost and Low Income Div., USAC, WC Docket No. 05-337, DA 11-243 (Feb. 8, 2011) ("*February 8 Letter*" or "*Letter*").

*February 8 Letter* may be imminent,[3] the Petitioners request expedited Bureau action on this Motion.

## INTRODUCTION

The Commission, in considering motions for stay, generally follows the criteria recited in the *Virginia Jobbers* decision.[4] These criteria are: (1) the likelihood that the party seeking the stay will prevail in its appeal; (2) whether the party will incur irreparable injury in the absence of a stay; (3) the likelihood that granting a stay would be harmful to other parties; and (4) how granting a stay would affect the public interest.

The relative importance of each of the four criteria varies based upon the circumstances of a particular case.[5] Thus, "[i]f there is a particularly overwhelming showing in at least one of the factors, the Commission may find that a stay is warranted notwithstanding the absence of another one of the factors."[6] In addition, the first of the factors may be more liberally construed if the requesting party makes a substantial case on the merits, and the other three factors strongly favor interim relief.[7]

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[3] The *February 8 Letter* does not appear to establish a deadline for the issuance of demand letters, but the *Letter* does require USAC to "implement the adjusted interim cap beginning with February 2011 support payments (the actual disbursement of which will occur in March 2011)." *February 8 Letter* at 1. This requirement suggests that USAC also will likely begin to issue demand notices in the near future. However, recent postings on USAC's website suggest that USAC may plan to immediately offset adjustments with no advance noticed to the Petitioners. *See* Note 26, *infra*. Such a procedure would be equally concerning and might provide further grounds for a stay, as it would likely violate Petitioners' due process rights and Sections 1.1911 and 1.912 of the Commission's rules.

[4] *See, e.g., Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Order, 23 FCC Rcd 1705, 1706-07 (para. 4) (CGAB 2008) ("*TRS Stay Order*") (citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) ("*Virginia Jobbers*")); *see also Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

[5] *See 4.9 GHz Band Transferred from Federal Government Use*, WT Docket No. 00-32, Order, 19 FCC Rcd 15270, 15272 (para. 5) (2004).

[6] *TRS Stay Order*, 23 FCC Rcd at 1707 (para. 4) (footnote omitted).

[7] *Comark Cable Fund III v. Northwestern Indiana Telephone Co., Inc.*, 104 FCC 2d 451, 456 (1985).

## ARGUMENT

As demonstrated below, each of the four factors followed by the Commission, in deciding whether to grant a request for stay, weighs in favor of the Petitioners' Motion.

### I. THE PETITIONERS ARE LIKELY TO PREVAIL ON THE MERITS OF OUR PETITION FOR RECONSIDERATION.

As discussed in detail in this section, numerous reasons support the Petitioners' view that we are likely to prevail on the merits of our Petition for Reconsideration.[8]

*First*, the Interim Cap on high-cost disbursements to competitive eligible telecommunications carriers ("ETCs"), which was adopted by the Commission in the *Interim Cap Order*[9] after the Commission had initiated a notice-and-comment rulemaking proceeding, constitutes a rule for purposes of the Administrative Procedure Act ("APA").[10] Therefore, the Commission was required to engage in a rulemaking proceeding before it could modify the Interim Cap.[11]

*Second*, the Bureau, in the *February 8 Letter*, has specifically ordered USAC to implement an adjustment to the Interim Cap.[12] This directive has the effect of creating a new law or duty.[13] The *February 8 Letter* is therefore a "legislative rule" for APA purposes.[14] The Bureau

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[8] Petitioners summarize their Petition for Reconsideration herein for clarity and incorporate the full Petition by this reference.

[9] *High-Cost Universal Service Support*, WC Docket No. 05-337, CC Docket No. 96-45, Order, 23 FCC Rcd 8834 (2008) ("*Interim Cap Order*"), *aff'd*, *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095 (D.C. Cir. 2009).

[10] *See High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Request for Review of Decision of Universal Service Administrator by Corr Wireless Communications, LLC,* WC Docket No. 05-337, CC Docket No. 96-45, Order and Notice of Proposed Rulemaking, 25 FCC Rcd 12854, 12857 (para. 8) (2010) ("*Corr Wireless Order*").

[11] *See, e.g., Am. Fed'n of Gov't Employees v. FLRA*, 777 F.2d 751, 759 (D.C. Cir. 1985).

[12] *February 8 Letter* at 1.

[13] *See Fertilizer Institute v. EPA,* 935 F.2d 1303, 1307-08 (D.C. Cir. 1991).

[14] The Supreme Court has explained that:

> The central distinction among agency regulations found in the APA is that between substantive [or legislative] rules on the one hand and interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice on the other. . . . [W]e

issued the *Letter* not for the purpose of interpreting the *Interim Cap Order*, but for the purpose of modifying a Commission rule, *i.e.*, the Interim Cap, in order to create a new obligation imposed on competitive ETCs. Thus, the Bureau's issuance of a legislative rule was subject to the notice-and-comment requirements of Section 553 of the APA.[15]

The *February 8 Letter* must be treated as a legislative rule that modified the Interim Cap rule previously prescribed by the Commission, because the *Interim Cap Order* cannot be construed as mandating or requiring any "true-up" of data used to establish the March 2008 baseline for the Interim Cap. The Commission in the *Interim Cap Order* chose to use projected cost data—rather than actual, trued-up cost data, as was recommended by the Federal-State Joint Board on Universal Service[16]—because the Commission found that doing so would avoid the imposition of immediate and substantial reductions in the level of support available to competitive ETCs, and because the Commission sought to provide competitive ETCs with certainty and predictability regarding their support levels pursuant to the Interim Cap.[17]

*Third*, the *February 8 Letter* patently does not comply with APA rulemaking requirements, since the Commission did not issue a notice of proposed rulemaking or otherwise afford the public an opportunity to consider and comment on the modifications to the Interim Cap that were directed in the *Letter*. The *Letter* also instructs USAC to treat recoverable amounts from

> [have] noted a characteristic inherent in the concept of a substantive rule . . . [and have] described a substantive rule—or a legislative-type rule—as one affecting individual rights and obligations. This characteristic is an important touchstone for distinguishing those rules that may be binding or have the force of law.

*Chrysler Corp. v. Brown*, 441 U.S. 281, 301-02 (1979) (internal quotations, footnotes, and citations omitted).

[15] 5 U.S.C. § 553.

[16] *See High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Recommended Decision, 22 FCC Rcd 8998, 9003 (para. 13) (Fed.-State Jt. Bd. 2007).

[17] *See Interim Cap Order*, 23 FCC Rcd at 8850 (para. 38).

carriers (resulting from the Interim Cap adjustments ordered by the Bureau) as debt, and to impose interest and penalties in certain circumstances. These further instructions to USAC also are made by the Bureau without providing any prior notice and opportunity for comment by interested parties.

*Fourth*, the requirement imposed by the *February 8 Letter* that the Petitioners must repay support amounts previously disbursed to us (because of downward adjustments in the Interim Cap baseline in certain states and territories, resulting from the adjustments directed by the Bureau in the *Letter*), constitutes a violation of our constitutional rights. This retroactive repayment obligation is an overly burdensome regulatory requirement that violates the Fifth Amendment Takings Clause.[18]

The facts of this case meet the three-prong test generally applied to determine whether a regulatory action has deprived a regulated entity of property without just compensation,[19] because (1) the Petitioners will experience a significant economic impact, adversely affecting their ability to retain customers and maintain their competitive position; (2) while the *Interim Cap Order* specifically sought to protect the expectations of the Petitioners and other competitive ETCs in connection with their investment decisions, the *February 8 Letter* ignores the Commission's intent by interfering with the Petitioners' reasonable expectations; and (3) the Bureau's action does not have any supportable basis because it goes beyond the Interim Cap rule, and its retroactive application cannot be justified.

*Fifth*, the fact that the *February 8 Letter* is a rule, because it modifies the Interim Cap rule previously prescribed by the Commission, also triggers an obligation to comply with the

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[18] *See Yee v. City of Escondido,* 503 U.S. 519, 522 (1992) (citing *Penn Central Transportation* v. *New York City,* 438 U. S. 104, 123-25 (1978)). The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

[19] *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986) (citing *Penn Central Transportation* v. *New York City,* 438 U. S. 104, 124 (1978)).

provisions of the Regulatory Flexibility Act. This statute specifies that (1) in any case in which an agency must issue a notice of proposed rulemaking, it must also issue an initial regulatory flexibility analysis detailing the impact of the agency's proposed action on small entities;[20] and (2) if the agency adopts a final rule in the rulemaking proceeding, it must also prepare a final regulatory flexibility analysis.[21] The Bureau issued the *Letter* without having complied with these Regulatory Flexibility Act requirements.

And, *sixth*, even assuming *arguendo* that the Bureau was not subject to APA requirements because the *February 8 Letter* did not modify the Interim Cap rule, but only purported to "interpret" the rule adopted by the Commission in the *Interim Cap Order*, the Bureau's "interpretation" cannot stand because it cannot be squared with the principles and requirements of Section 254 of the Communications Act of 1934 ("Act").[22] Section 254(b)(5) of the Act requires that universal service support must be "specific, predictable and sufficient[,]"[23] and the Commission, in the *Interim Cap Order*, specifically indicated that its objective was to ensure that the design and operation of the cap "will not undermine the expectations underlying competitive ETC investment decisions . . . ."[24]

The *February 8 Letter* has the effect of ignoring the statutory mandate in Section 254 and subverting the Commission's goal in the *Interim Cap Order* of avoiding any unpredictability that would undercut the reasonable expectations of competitive ETCs investing in networks in rural and high-cost areas. This effect is produced by the fact that the *Letter* requires that "the adjusted interim cap . . . be implemented *for the entire period* since August 1, 2008, the effective date of

[20] *See* 5 U.S.C. § 603(a).

[21] *See* 5 U.S.C. § 604(a).

[22] 47 U.S.C. § 254.

[23] 47 U.S.C. § 254(b)(5).

[24] *Interim Cap Order*, 23 FCC Rcd at 8850 (para. 38).

the *Interim Cap Order*."[25] This retroactive application of the Interim Cap adjustments tramples on both the statutory principle of predictability and the Commission's previously stated objective of accounting for the reasonable expectations of competitive ETCs.

## II. THE PETITIONERS WILL SUFFER IRREPARABLE HARM IF A PARTIAL STAY IS NOT GRANTED.

Pursuant to the directive issued in the *February 8 Letter*, each of the Petitioners will be required to repay high-cost support disbursements previously received by the Petitioner in one or more states or territories. This "recoverable amount" is treated by the Bureau as a "debt owed to the United States."[26] Each Petitioner received high-cost funding pursuant to the Interim Cap rule, invested that funding in the deployment and operation of its network[27] as required by the Commission's rules, and is now being slapped with a completely unexpected "debt owed to the United States . . . ."[28]

None of the petitioners had any inkling[29] that this debt—which has materialized nearly three years after USAC began making disbursements pursuant to the Interim Cap rule—would be

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[25] *February 8 Letter* at 1 (emphasis added).

[26] *Id.* at 2. However, last week USAC posted revised February disbursements to the Petitioners on its website. *See*, http://www.usac.org/hc/tools/disbursements/default.aspx. Examples are included in Attachment A hereto. The new postings suggest that USAC may not even follow the directive of the *February 8 Letter*, including notice of the indebtedness, and other protections required by the Debt Collection Improvement Act ("DCIA") and Sections 1.1911 and 1.912 of the Commission's rules. Rather, Petitioners fear that USAC may simply offset the entire amount of the adjustment against current and future support, without any advance notice. In some cases this may mean the debt is asserted and then satisfied on the same day. That process would simply turn the harm from a balance sheet problem into an income statement problem, without any change in the degree of harm.

[27] *See* Section 54.7 of the Commission's Rules (providing that "[a] carrier that receives federal universal service support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended").

[28] *February 8 Letter* at 2.

[29] At least until August 2010—more than two years after the Interim Cap was fixed. *See also*, Note 33, *infra*.

imposed.[30] On top of the new debt, most of the Petitioners are also being hit with reductions in the cap and reduced high cost support going forward indefinitely into the future. The new debt obligation, coupled with the future reductions in support, would likely be "unduly burdensome" in some cases,[31] and is likely to disrupt and undermine the ability of the Petitioners to adhere to their current plans for the deployment of facilities and the provision of service in the states involved. In the absence of a stay of the debt collection requirements imposed by the *February 8 Letter*, the Petitioners will be irreparably harmed in a variety of ways, depending on their particular circumstances. Typical harms are illustrated by the declarations filed with this motion.[32]

First, because this new debt was completely unexpected[33]—as a *de facto* change the to the Commission's Interim Cap rule—it was not disclosed or booked in any way in Petitioners' financial statements. Accordingly, imposition and collection of the alleged debt will irreparably harm Petitioners' reputations in the financial community.[34] Moreover, it will completely undermine investor and lender confidence in the predictability of the receipt of revenues from the

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[30] Declaration of James H. Woody In Support Of Joint Motion For Partial Stay ("Woody Declaration"), ¶ 9, and Declaration of Federico Grosso ("Grosso Declaration") In Support Of Joint Motion For Partial Stay, ¶¶ 8-9. The declarations, which are incorporated herein by this reference, provide the requisite detail needed to show irreparable harm. However, because each of the declarations contains information that is proprietary, the Petitioners are seeking confidential treatment pursuant to 47 C.F.R. § 0.459. In order to avoid redaction, this Motion will only summarize the various harms that are more particularly set forth in the confidential declarations.

[31] *See February 8 Letter* at at 1.

[32] Woody Declaration, ¶¶ 4, 8-11; Grosso Declaration, ¶¶ 4, 7-16.

[33] Some of the Petitioners became aware of the potential new debt sometime in the fall of 2010, based on the August 24, 2010 letter from the Wireline Competition Bureau to USAC. This was two years after the Commission set the Interim cap. Moreover, the August letter was not posted on the Commission's website, so the debt was not generally known until the *February 8 Letter* was issued.

[34] *E.g.*, Grosso Declaration, ¶¶ 8-10. Such harm is considered irreparable. *See, e.g., Patriot, Inc. v. United States Dep't of Hous. & Urban Dev.*, 963 F. Supp. 1, 5 (D.D.C. 1997) (finding that "damage to [the] business reputation" of estate and financial planning services companies from agency's procedurally irregular enforcement action would be irreparable).

USF.[35] For some of the Petitioners it will make it more difficult to obtain necessary working capital absent the stay, or will force them to accept less favorable terms and conditions.[36] Even if the Petition for Reconsideration is granted and the debt is therefore later reversed, the damage will not be undone.[37]

Second, at least some of the Petitioners will be forced to increase rates for services provided to our customers in order to fund the repayment of newly-created debt obligations in the *February 8 Letter*.[38] Some or all of the Petitioners will find it necessary to reduce the range, scope, and availability of our services in the wake of these new debt obligations.[39] These increases in rates, together with adverse impacts on the services provided by the Petitioners, will erode our ability to compete with other carriers. The competitive inequity that would be imposed on the Petitioners by the *Letter* also would create the likelihood that the Petitioners will permanently lose customers to other carriers because of the disparity in rates and the adverse affects of the new debt obligation on the ability of the Petitioners to maintain the range, scope, and availability of our services.[40]

Third, the Petitioners also will face the likely prospect of the loss of our customers' goodwill as a result of our being required to meet the obligations imposed by the *February 8 Let-*

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[35] *E.g.,* Grosso Declaration, ¶¶ 8-10.

[36] *Id.,* ¶ *9.*

[37] *See, e.g., Lavapies v. Bowen*, 687 F. Supp. 1193, 1211 (S.D. Ohio 1988) (finding that suspension from Medicare program would cause irreparable injury by "harm to [a doctor's] professional reputation" that "[a] subsequent vindication . . . [would] likely not remedy"), *aff'd on other grounds*, 883 F.2d 465 (6th Cir. 1989).

[38] *E.g.,* Grosso Declaration, ¶¶ 12, 15.

[39] *E.g.,* Woody Declaration, ¶¶ 8-10; Grosso Declaration, ¶¶ 11-15. The same would be true if the debt is collected via an offset against current or future support payments. *See* Note 26, *supra.*

[40] *E.g.,* Woody Declaration, ¶¶ 8; Grosso Declaration, ¶¶ 12, 14-16. *See Merrill Lynch, Pierce, Fenner & Smith v. Bradley*, 756 F.2d 1048, 1055 (4th Cir. 1985) (preliminary relief must be granted where the petitioner "faced irreparable, non-compensable harm in the loss of its customers").

*ter*. This loss of customer goodwill, which will occur in the event of sudden and dramatically increased rates and the retrenchment of service, will cause irreparable harm to the Petitioners.[41]

## III. OTHER INTERESTED PARTIES WILL BE BENEFITTED, NOT HARMED, IF THE PARTIAL STAY IS GRANTED.

A grant of the requested stay will not impose any harm on consumers, incumbent LECs, or competitive ETCs that may receive a greater level of support pursuant to the operation of the *February 8 Letter*. The substantial new debt and future reductions in support cannot help but have an adverse impact on how Petitioners conduct business. As the supporting declarations establish, absent a stay, Petitioners will be forced to cut costs, increase rates, or both. Thus, consumers in rural and high-cost areas served by the Petitioners will actually benefit from grant of a stay.

A stay would prevent the prospect of rate increases or adverse impacts on the quality and range of services provided by the Petitioners. And consumers who pay federal universal service surcharges in connection with their receipt of interstate telecommunications services will not be harmed by a grant of a stay, because there is only a very remote possibility that the imposition of the *February 8 Letter* would reduce the contribution factor (which in turn may be, but is not required to be, passed on to consumers[42]). The greater likelihood is that the Commission would use the recaptured disbursements to assist in the funding of the deployment of fixed and mobile broadband infrastructure.[43]

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[41] *See Multi-Channel TV Cable v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994) ("when the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong is satisfied").

[42] *See* 47 C.F.R. § 54.712.

[43] *See, e.g.*, *Corr Wireless Order*, 25 FCC Rcd at 12862 (para. 20) (instructing USAC "to reserve any reclaimed [high-cost support] funds [surrendered by Sprint and Verizon Wireless] as a fiscally responsible down payment on proposed broadband universal service reform, as recommended in the National Broadband Plan").

Incumbent LECs will not be harmed by a stay because maintenance of the *status quo* could not impose any burden on these carriers. The grant of a stay would not interfere with their continued receipt of high-cost disbursements without any interruption or disruption, and would have no adverse impact on their ability to compete against the Petitioners in rural and high-cost areas.

Finally, competitive ETCs that may receive a greater level of support pursuant to the operation of the *February 8 Letter* will not be harmed by grant of a stay, because the Petitioners are requesting a partial stay that would only bar the collection of repayments from the Petitioners, and any downward adjustment of the cap in any state, during the pendency of our Petition for Reconsideration. Thus, competitive ETCs operating in states that would receive a net increase in the level of support, if the Interim Cap baseline is adjusted pursuant to the directive in the *Letter*,[44] will not be deprived of access to increased levels of support if the stay being requested is granted. It is also important to note that the impact of these increases in the Interim Cap on the overall size of the universal service fund would be less than less than 0.5 percent. This *de minimis* increase would get lost in rounding in calculation of the contribution factor and therefore is not likely to cause any offsetting harm to consumers generally.

## IV. THE PUBLIC INTEREST FAVORS GRANTING A PARTIAL STAY.

As the Petitioners have discussed in the preceding sections, both consumers and competition will benefit from grant of a partial stay. The requested stay will protect consumers in rural and high-cost areas served by the Petitioners from the prospect of rate increases, and will also provide an opportunity for these consumers to benefit from the continued ability of the Petitioners to deploy and maintain their networks and expand coverage.[45] Moreover, there is no prospect

[44] *See February 8 Letter* at Attach. A (Interim Cap Adjustments by State).

[45] *E.g.*, Woody Declaration, ¶¶ 9-10; Grosso Declaration, ¶¶ 12-14.

of any countervailing harm to consumers generally, because decreases in the level of universal service surcharges are not likely to be forgone if a stay is granted.

In addition, the ability of the Petitioners to continue to compete in the local exchange marketplace will be preserved by grant of the requested stay. The unwarranted imposition of potentially substantial debt obligations on the Petitioners would unreasonably threaten our competitive position by draining away financial resources that otherwise could be devoted to the continued deployment of infrastructure and provision of service in rural and high-cost areas. Grant of a stay would forestall these competitive harms.

The impact of a stay on consumers, and on local exchange competition, illustrates the public interest benefits that would accrue from a grant of a stay.

## CONCLUSION

For all of the foregoing reasons, the Bureau should grant the Petitioners' Motion and partially stay implementation of the *February 8 Letter* pending the Bureau's disposition of the Petition for Reconsideration.

Respectfully submitted,

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By: __________/s/__________
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March 31, 2011

# ATTACHMENT A

# AST Telecom, LLC d/b/a Blue Sky Communications (American Samoa) (SAC 679000)



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**High Cost Disbursement Data** (Spin = ALL Sac = 679000 San = ALL Year = ALL Month = ALL State = ALL )
This disbursement tool contains data from Jan 2003 through Feb 2011

| State | Spin | Study Area Code | Study Area Name | HCL | HCM | IAS | ICLS | LSS | LTS | SNA | SVS | Year | Month |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| AS | 143029520 | 679000 | AST TELECOM, LLC DBA BLUE SKY COMMUNICATIONS | $0 | $0 | $0 | ($720,878) | ($292,905) | $0 | $0 | $0 | 2011 | Feb |
| AS | 143029520 | 679000 | AST TELECOM, LLC DBA BLUE SKY COMMUNICATIONS | $0 | $0 | $0 | $126,518 | $52,896 | $0 | $0 | $0 | 2011 | Jan |
| AS | 143029520 | 679000 | AST TELECOM, LLC DBA BLUE SKY COMMUNICATIONS | $0 | $0 | $0 | $97,050 | $54 157 | $0 | $0 | $0 | 2010 | Dec |
| AS | 143029520 | 679000 | AST TELECOM, LLC DBA BLUE SKY COMMUNICATIONS | $0 | $0 | $0 | $190 137 | $25,319 | $0 | $0 | $0 | 2010 | Nov |
| AS | 143029520 | 679000 | AST TELECOM, LLC DBA BLUE SKY COMMUNICATIONS | $1,464 | $0 | $0 | $96,735 | $54,402 | $0 | $0 | $0 | 2010 | Oct |
| AS | 143029520 | 679000 | AST TELECOM, LLC DBA BLUE SKY COMMUNICATIONS | $0 | $0 | $0 | $104 401 | $55 703 | $0 | $0 | $0 | 2010 | Sep |



# East Kentucky Network LLC d/b/a Appalachian Wireless (Kentucky) (SAC 269007)



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**High Cost Disbursement Data** (Spin = ALL , Sac = 269007 , San = ALL Year = ALL Month = ALL , State = ALL )
This disbursement tool contains data from Jan 2003 through Feb 2011

| State | Spin | Study Area Code | Study Area Name | HCL | HCM | IAS | ICLS | LSS | LTS | SNA | SVS | Year | Month |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| KY | 143000997 | 269007 | EAST KENTUCKY NETWORK, LLC DBA APPALACHIAN WIRELESS | $161 883 | $32 915 | $101,909 | $203 107 | $44,837 | $0 | $28,456 | $0 | 2011 | Feb |
| KY | 143000997 | 269007 | EAST KENTUCKY NETWORK, LLC DBA APPALACHIAN WIRELESS | $220,177 | $47 735 | $28 501 | $281 386 | $66,213 | $0 | $32,696 | $0 | 2011 | Jan |
| KY | 143000997 | 269007 | EAST KENTUCKY NETWORK, LLC DBA APPALACHIAN WIRELESS | $187,537 | $45 571 | $53 322 | $248,161 | $60,159 | $0 | $14,705 | $0 | 2010 | Dec |
| KY | 143000997 | 269007 | EAST KENTUCKY NETWORK, LLC DBA APPALACHIAN WIRELESS | $187 541 | $45,621 | $52 914 | $248,405 | $60,148 | $0 | $14,709 | $0 | 2010 | Nov |
| KY | 143000997 | 269007 | EAST KENTUCKY NETWORK, LLC DBA APPALACHIAN WIRELESS | $156,665 | $37,123 | $50,644 | $204,177 | $48,944 | $0 | $12,188 | $0 | 2010 | Oct |
| KY | 143000997 | 269007 | EAST KENTUCKY NETWORK, LLC DBA APPALACHIAN WIRELESS | $198 509 | $42,452 | $66 684 | $252,442 | $63,576 | $0 | $15,571 | $0 | 2010 | Sep |

# Commnet of Nevada, LLC (Nevada) (SAC 559005)

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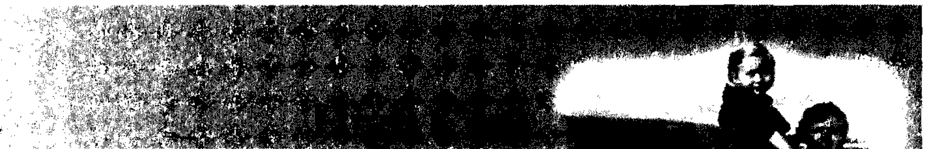

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**High Cost Disbursement Data** (Spin = ALL , Sac = 559005 , San = ALL , Year = ALL , Month = ALL , State = ALL )
This disbursement tool contains data from Jan 2003 through Feb 2011

| State | Spin | Study Area Code | Study Area Name | HCL | HCM | IAS | ICLS | LSS | LTS | SNA | SVS | Year | Month |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| NV | 143033464 | 559005 | Commnet of Nevada, LLC | ($153,385) | $0 | $0 | ($192,688) | ($81,177) | $0 | $12,186 | $0 | 2011 | Feb |
| NV | 143033464 | 559005 | Commnet of Nevada, LLC | $57,547 | $0 | $0 | $37,738 | $9,471 | $0 | $10,696 | $0 | 2011 | Jan |
| NV | 143033464 | 559005 | Commnet of Nevada, LLC | $74,665 | $0 | $0 | $68,400 | $21,256 | $0 | $0 | $0 | 2010 | Dec |
| NV | 143033464 | 559005 | Commnet of Nevada, LLC | $74,665 | $0 | $0 | $68,400 | $21,256 | $0 | $0 | $0 | 2010 | Nov |
| NV | 143033464 | 559005 | Commnet of Nevada, LLC | $75,034 | $0 | $0 | $68,400 | $21,256 | $0 | $0 | $0 | 2010 | Oct |
| NV | 143033464 | 559005 | Commnet of Nevada, LLC | $87,215 | $0 | $0 | $81,734 | $24,906 | $0 | $0 | $0 | 2010 | Sep |
| NV | 143033464 | 559005 | Commnet of Nevada, LLC | $72,908 | $0 | $0 | $67,687 | $20,758 | $0 | $0 | $0 | 2010 | Aug |
| NV | 143033464 | 559005 | Commnet of Nevada, LLC | $63,770 | $0 | $0 | $58,506 | $18,104 | $0 | $0 | $0 | 2010 | Jul |

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# Commnet of Nevada, LLC (Nevada) (SAC 559007)

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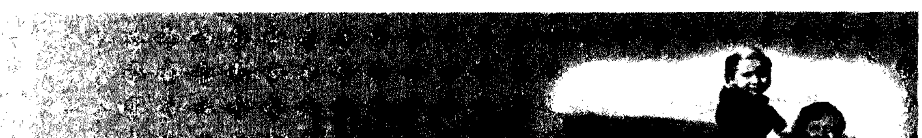

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**High Cost Disbursement Data** (Spin = ALL , Sac = 559007 , San = ALL , Year = ALL , Month = ALL , State = ALL )
This disbursement tool contains data from Jan 2003 through Feb 2011

| State | Spin | Study Area Code | Study Area Name | HCL | HCM | IAS | ICLS | LSS | LTS | SNA | SVS | Year | Month |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| NV | 143033464 | 559007 | Commnet of Nevada, LLC | ($3,049) | $0 | $902 | ($1,339) | ($714) | $0 | $0 | $0 | 2011 | Feb |
| NV | 143033464 | 559007 | Commnet of Nevada, LLC | $11,224 | $0 | $2,854 | $5,876 | $1,887 | $0 | $0 | $0 | 2011 | Jan |
| NV | 143033464 | 559007 | Commnet of Nevada, LLC | $12,575 | $0 | $7,528 | $6,329 | $2,258 | $0 | $0 | $0 | 2010 | Dec |
| NV | 143033464 | 559007 | Commnet of Nevada, LLC | $12,575 | $0 | $7,491 | $6,329 | $2,258 | $0 | $0 | $0 | 2010 | Nov |
| NV | 143033464 | 559007 | Commnet of Nevada, LLC | $12,581 | $0 | $6,867 | $6,329 | $2,258 | $0 | $0 | $0 | 2010 | Oct |
| NV | 143033464 | 559007 | Commnet of Nevada, LLC | $13,825 | $0 | $9,086 | $6,967 | $2,485 | $0 | $0 | $0 | 2010 | Sep |
| NV | 143033464 | 559007 | Commnet of Nevada, LLC | $12,295 | $0 | $7,199 | $6,192 | $2,208 | $0 | $0 | $0 | 2010 | Aug |
| NV | 143033464 | 559007 | Commnet of Nevada, LLC | $11,602 | $0 | $7,310 | $5,834 | $2,081 | $0 | $0 | $0 | 2010 | Jul |

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# Union Telephone Company d/b/a Union Cellular (Wyoming) (SAC 519905)

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**High Cost Disbursement Data** (Spin = ALL , Sac = 519905 , San = ALL , Year = ALL , Month = ALL , State = ALL )
This disbursement tool contains data from Jan 2003 through Feb 2011.

| State | Spin | Study Area Code | Study Area Name | HCL | HCM | IAS | ICLS | LSS | LTS | SNA | SVS | Year | Month |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| WY | 143000734 | 519905 | UNION TELEPHONE CO DBA UNION CELLULAR | ($30,986) | $58,710 | $40,141 | $78,874 | $11,145 | $0 | $150 | $0 | 2011 | Feb |
| WY | 143000734 | 519905 | UNION TELEPHONE CO DBA UNION CELLULAR | $55,097 | $125,343 | $19,681 | $268,041 | $148,264 | $0 | $1,832 | $0 | 2011 | Jan |
| WY | 143000734 | 519905 | UNION TELEPHONE CO DBA UNION CELLULAR | $70,054 | $76,422 | $33,738 | $272,275 | $119,252 | $0 | $1,853 | $0 | 2010 | Dec |
| WY | 143000734 | 519905 | UNION TELEPHONE CO DBA UNION CELLULAR | $70,031 | $76,414 | $33,518 | $272,253 | $119,234 | $0 | $1,848 | $0 | 2010 | Nov |
| WY | 143000734 | 519905 | UNION TELEPHONE CO. DBA UNION CELLULAR | $72,422 | $86,779 | $60,282 | $272,538 | $119,450 | $0 | $1,517 | $0 | 2010 | Oct |
| WY | 143000734 | 519905 | UNION TELEPHONE CO DBA UNION CELLULAR | $170,262 | $177,518 | $76,298 | $619,858 | $295,108 | $0 | $4,654 | $0 | 2010 | Sep |
| [illegible] | [illegible] | [illegible] | UNION TELEPHONE CO | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |

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# Cellular Properties d/b/a Cellular One of East Central Illinois (Illinois) (SAC 349011)

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**High Cost Disbursement Data** (Spin = ALL , Sac = ALL , San = Cellular Properties % Year = ALL , Month = ALL , State = ALL )
This disbursement tool contains data from Jan 2003 through Feb 2011

| State | Spin | Study Area Code | Study Area Name | HCL | HCM | IAS | ICLS | LSS | LTS | SNA | SVS | Year | Month |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| IL | 143000402 | 349011 | CELLULAR PROPERTIES DBA CELLULAR ONE OF EAST CENTRAL ILLINOI | $2,557 | $0 | $10,158 | $25,236 | $17,205 | $0 | ($453) | $0 | 2011 | Feb |
| IL | 143000402 | 349011 | CELLULAR PROPERTIES DBA CELLULAR ONE OF EAST CENTRAL ILLINOI | $18,385 | $0 | $5,936 | $60,754 | $36,079 | $0 | $794 | $0 | 2011 | Jan |
| IL | 143000402 | 349011 | CELLULAR PROPERTIES DBA CELLULAR ONE OF EAST CENTRAL ILLINOI | $16,841 | $0 | $5,659 | $46,233 | $30,028 | $0 | $731 | $0 | 2010 | Dec |
| IL | 143000402 | 349011 | CELLULAR PROPERTIES DBA CELLULAR ONE OF EAST CENTRAL ILLINOI | $21,890 | $0 | $6,385 | $49,017 | ($130,390) | $0 | $926 | $0 | 2010 | Nov |
| IL | 143000402 | 349011 | CELLULAR PROPERTIES DBA CELLULAR ONE OF EAST CENTRAL ILLINOI | $16,976 | $0 | $5,350 | $44,109 | $17,375 | $0 | $522 | $0 | 2010 | Oct |

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# Cellular South Licenses, Inc. (Alabama) (SAC 259004)

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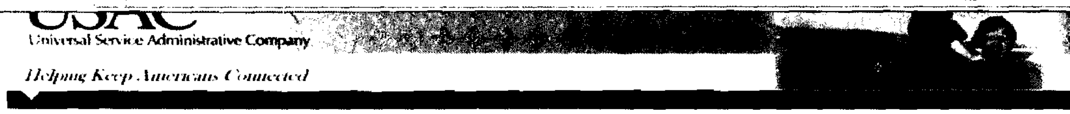


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**High Cost Disbursement Data** (Spin = ALL , Sac = ALL , San = Cellular South% , Year = ALL , Month = ALL , State = ALL )
This disbursement tool contains data from Jan 2003 through Feb 2011

| State | Spin | Study Area Code | Study Area Name | HCL | HCM | IAS | ICLS | LSS | LTS | SNA | SVS | Year | Month |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| AL | 143025223 | 259004 | CELLULAR SOUTH LICENSES, INC. (ALABAMA) | $878 | $1 860 | $1,310 | $7 276 | $303 | $0 | $0 | $0 | 2011 | Feb |
| MS | 143025223 | 289001 | CELLULAR SOUTH LICENSE INC | $803,388 | $3,288 042 | $601.887 | $612,335 | $122 272 | $0 | $16,722 | $0 | 2011 | Feb |
| AL | 143025223 | 259004 | CELLULAR SOUTH LICENSES, INC (ALABAMA) | $917 | $3,095 | $440 | $9,404 | $450 | $0 | $0 | $0 | 2011 | Jan |
| MS | 143025223 | 289001 | CELLULAR SOUTH LICENSE, INC | $1,012,412 | $4,064,694 | $168,074 | $748,496 | $154,380 | $0 | $24 142 | $0 | 2011 | Jan |
| AL | 143025223 | 259004 | CELLULAR SOUTH LICENSES, INC. (ALABAMA) | $1,078 | $3,960 | $800 | $10,450 | $317 | $0 | $0 | $0 | 2010 | Dec |
| MS | 143025223 | 289001 | CELLULAR SOUTH LICENSE, INC | $997,177 | $3 923,171 | $320 476 | $600.039 | $147 145 | $0 | $17,826 | $0 | 2010 | Dec |
| AL | 143025223 | 259004 | CELLULAR SOUTH LICENSES, INC (ALABAMA) | $1 068 | $3.959 | $802 | $10,448 | $324 | $0 | $0 | $0 | 2010 | Nov |
| MS | 143025223 | 289001 | CELLULAR SOUTH LICENSE INC | $1,003,914 | $3,934,002 | $320,389 | $604 578 | $148,151 | $0 | $17,873 | $0 | 2010 | Nov |
| AL | 143025223 | 259004 | CELLULAR SOUTH LICENSES INC (ALABAMA) | $1,069 | $3,751 | $882 | $10 719 | $348 | $0 | $0 | $0 | 2010 | Oct |

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# Cellular South License, Inc. (Mississippi) (SAC 289001)

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**High Cost Disbursement Data** (Spin = ALL , Sac = ALL , San = Cellular South % , Year = ALL , Month = ALL , State = MS )
This disbursement tool contains data from Jan 2003 through Feb 2011.

| State | Spin | Study Area Code | Study Area Name | HCL | HCM | IAS | ICLS | LSS | LTS | SNA | SVS | Year | Month |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| MS | 143025223 | 289001 | CELLULAR SOUTH LICENSE, INC | $803,388 | $3,288,042 | $601,887 | $612,335 | $122,272 | $0 | $16,722 | $0 | 2011 | Feb |
| MS | 143025223 | 289001 | CELLULAR SOUTH LICENSE, INC | $1,012,412 | $4,064,694 | $168,074 | $748,496 | $154,380 | $0 | $24,142 | $0 | 2011 | Jan |
| MS | 143025223 | 289001 | CELLULAR SOUTH LICENSE, INC. | $997,177 | $3,923,171 | $320,476 | $600,039 | $147,145 | $0 | $17,826 | $0 | 2010 | Dec |
| MS | 143025223 | 289001 | CELLULAR SOUTH LICENSE, INC | $1,003,914 | $3,934,002 | $320,389 | $604,578 | $148,151 | $0 | $17,873 | $0 | 2010 | Nov |
| | | | CELLULAR SOUTH | | | | | | | | | | |

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